

Award No. 9765

Docket No. CL-9501

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Joseph E. Fleming, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES**

**THE CHICAGO, MILWAUKEE, ST. PAUL AND
PACIFIC RAILROAD COMPANY**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

1. Carrier violated the rules of the Clerks' Agreement when it refused to assign Employee M. I. Mitchell to Position No. 80 when she became the senior applicant for that position.

2. Carrier be required to assign Employee Mitchell to Position No. 80 and that she be compensated the difference between what she earned and what she would have earned had she been properly assigned to Position No. 80.

EMPLOYEES' STATEMENT OF FACTS: On October 20, 1955 Carrier issued Bulletin No. 30 advertising Position No. 80, Assistant Manager in the Reservation Bureau, 7 A.M. to 3:30 P.M., with rest days of Saturday and Sunday. Description of the duties as shown on the bulletin were as follows: "Handles personnel & office management, assists in ordering cars & preparing diagrams." Rate of the position was shown as \$16.1661 per day.

The following employees applied for the position:

Name	Seniority Date
A. B. Lutz	12/1/42
M. I. Mitchell	3/1/43
J. J. Black	4/11/43
W. P. Graham	6/6/45
V. I. Neuschwander	9/6/45
H. J. Ahrens	1/16/46
K. G. Neuman	4/20/55
W. Vukovich	(From another seniority district)

On November 7, 1955 Carrier issued bulletin assigning Employee J. J. Black to the position. Employee Black was junior to both Employees A. B. Lutz and M. I. Mitchell.

of seniority, the position would be awarded to Mrs. Lutz, who was the senior applicant and possesses as much fitness and ability for the position as does Claimant Mitchell, although she (Mrs. Lutz) has recognized that neither she nor Miss Mitchell possess the fitness and ability necessary to properly fulfill the functions of this supervisory position.

Prior to November 1, 1955 the Carrier had two supervisors — Manager and Night Manager, with seven (7) reservation and information clerks in the Reservation Bureau. With the increased service requirements, after November 1, 1955, the Carrier had three supervisors — Manager, Assistant Manager and Night Manager, and twenty-one (21) reservation and information clerks. There were five additional trans-continental streamlined passenger trains with all space reserved, which added considerably to the responsibilities of the Bureau. With such added responsibilities and the increase in personnel to the extent of approximately 200%, the employees seek to have the Carrier assign to the one additional and important supervisory position an employee who has never occupied a supervisory position, has never at any time performed the functions of a supervisor in the Reservation Bureau or elsewhere and whose activities have been confined entirely to those of reservation and information clerk and does not possess sufficient fitness and ability to properly fulfill the duties of the position.

It cannot truthfully be said that the Carrier has acted unfairly, arbitrarily or capriciously in this case but to the contrary, it sought to avoid a dispute by foregoing the right it felt it should have in placing this position, along with similar supervisor positions of Manager and Night Manager under Rule 1 (b) of the Schedule Agreement.

Board Awards have repeatedly held it is not the function of your Honorable Board to substitute its judgment for that of the Carrier in matters of this kind. In this regard we should like to quote the following from the Opinion in Award 6829:

"We cannot substitute our judgment for that of the Carrier in matters of this kind. Our function is limited to a review of the Carrier's decision to ascertain whether it was made in good faith upon sufficient supporting evidence, or whether it was the result of capricious or arbitrary action without reasonable support in the record before us.

In the instant case, the Employees have failed to prove that the Claimant had fitness and ability to fill the position here involved, or that the Carrier acted in a biased, arbitrary, capricious, unreasonable, or prejudicial manner in denying the position to the Claimant."

For the proper conduct of its business it is absolutely essential that an important position such as Assistant Manager in the Reservation Bureau, under the circumstances prevailing in this case, be filled with an employee possessing sufficient fitness and ability to fully meet the responsibilities of the position, otherwise there would be no reason for the position being in existence. There is no justification for this claim and we respectfully ask that it be denied.

All data contained herein has been presented to the employees.

(EXHIBITS NOT REPRODUCED)

OPINION OF BOARD: On October 20, 1955, Carrier acquired five additional passenger trains which necessitated the hiring of fourteen additional Reservation and Information Clerks and established an additional supervisory

position designated as "Assistant Manager". Carrier bulletined this position on October 20, 1955 and the following were the senior applicants:

Mrs. A. B. Lutz, seniority date December 1, 1942
Miss Mary I. Mitchell, seniority date March 1, 1943
John J. Black, seniority date April 11, 1943

These three bid for the position and it was awarded to John J. Black, the third senior applicant.

Mrs. Lutz, the first senior applicant, advised the Carrier that she would take no exception to the award made but that she was as well qualified as the second senior applicant and would not withdraw her bid unless Miss Mitchell withdrew her bid. The second senior applicant is the bidder here and claimant.

Claimant wrote a letter on February 27, 1956 in which she set out her qualification as to her fitness and ability. She worked many years in the Reservation Bureau and stated that in the absence of the regular supervisor she had acted in a supervisory capacity in the Bureau. This latter contention the Carrier denies.

Mr. Chermack in his letter of November 14, 1955 has no opinion on her fitness and ability but filed the claim for her. Later on December 22, 1955 at about the time he was promoted to chief clerk he says in a letter to Mr. Wallace that it is his opinion that Miss Mitchell does not possess sufficient fitness and ability to discharge the duties of the position. His opinion must be regarded in the light of all the surrounding circumstances and little, if any, weight should be attached to it. The objection of the Carrier that she would have to attend meetings and work overtime have no bearing on her fitness and ability.

There is no showing that Mrs. Lutz is in a position or has any authority to pass on the fitness and ability of Claimant. She didn't want the position and neither did she want Miss Mitchell to have it. In the absence of agreement restrictions the Carrier may make the initial determination of the qualifications of employees. (Award 8214.) Under such circumstances the Division will not normally overrule the Carrier's action unless it can be shown that the action was arbitrary, unreasonable, capricious or of a discriminatory character.

In this dispute, when the evidence is all sifted, there remains but one valid objection to Claimant holding this position. Claimant is a woman. (Award 7817.) Therefore the claim should be allowed.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Carrier violated the Agreement.

AWARD

Claim allowed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. SCHULTY
Executive Secretary

Dated at Chicago, Illinois, this 16th day of December 1960.

DISSENT TO AWARD NUMBER 9765, DOCKET NUMBER CL-9501

Award 9765 lacks qualities essential to a sound decision. It gives no consideration whatsoever to the importance which attached to supervisory positions in the Reservation and Information Bureau prior to expansion of the Bureau, and to which the parties themselves gave recognition in excepting such positions from certain Agreement provisions, and it ignores the much greater importance attaching to such positions under the vastly expanded operations of the Bureau. The qualifications for these positions involve not only the general fitness of the incumbents to meet all of the requirements of the positions, but their actual ability to make sound decisions, to give instructions and to insure that they are carried out.

The award errs seriously in giving little if any weight to the opinion of Local Chairman Chermak in the circumstances here, simply because of his promotion to a supervisory position, in which he stated that, after having made a study of the duties, it was his just opinion that candidates Nos. 1 and 2 do not possess sufficient fitness and ability to discharge the duties of the position. An employe possessing qualifications which merited his promotion to a supervisory position, who has rendered his just opinion after making a study of the duties, and who also is familiar with the qualifications of the bidders, is certainly worthy of belief and his opinion is worthy of due weight in the decision in the absence of proof that his opinion was prejudiced, and particularly in the absence of proof showing beyond a reasonable doubt that Claimant was qualified for the position involved here.

The basic conclusion of Award 9765 that when the evidence is all sifted there remains but one valid objection to Claimant's holding the position, namely, that Claimant is a woman, indicates that point alone was a valid cause for denying the claim, but it also indicates a failure to give due weight to the decision of responsible officials who are familiar with Claimant's service performance and her lack of qualifications for the supervisory position in question. Furthermore, it indicates Carrier's denial of any experience in a supervisory capacity by Claimant was treated lightly and as of no significance despite the absence of probative evidence of her experience in a supervisory capacity with power and authority to make decisions, give instructions and see that they are carried out.

Award 9765 falls far short of conformity with basic principles formulated and applied by this Division with consistency in this field in the past.

For these and other reasons we dissent.

/s/ J. F. Mullen

/s/ R. A. Carroll

/s/ P. C. Carter

/s/ W. H. Castle

/s/ D. S. Dugan

**LABOR MEMBERS' REPLY TO CARRIER MEMBER'S DISSENT
TO AWARD NO. 9765, DOCKET CL-9501**

The Dissenters have again jumped to wild conclusions based on false factual assumptions. The verbiage used by them reminds me of what Shakespeare wrote in the Merchant of Venice;

"Gratiano speaks an infinite deal of nothing, more than any man in all Venice. His reasons are as two grains of wheat hid in two bushels of chaff: You shall seek all day ere you find them, and when you have found them, they are not worth the search."

I do not blame the Dissenters for attempting to cover up the fact that Carrier discriminated against Claimant by refusing to promote her in accordance with her seniority because of her sex. If I was guilty of such conduct, I would be ashamed of it too. However, the record clearly shows that Carrier's immediate supervisors specifically stated they did not want her on the position because she was a woman. Carrier did not refute this, although it attempted to explain it away by unfounded charges that she did not have sufficient fitness and ability, which was based primarily on the gratuitous statements of two other employees. One who had insufficient courage to fight for the promotion, the other Local Chairman Chermak, who changed from a representative of the employees to a supervisor and conveniently changed his opinion at the same time. It is amusing to watch the importance the Carrier Members attach to a statement in their favor, while at the same time rejecting a statement from the same individual that is contrary thereto. Local Chairman Chermak testified that:

"A meeting was held, and an authorized representative of the Passenger Traffic Department, as well as the Manager of the reservation bureau were present to hear pleas, and complaints of Sister Mitchell.

"Sister Mitchell was told that the company did not want a woman on this position No. 80, on Bulletin No. 30 due to the fact that it is a key position, and that management prefers a man for this particular position."

This statement was confirmed by other Members of the Local Committee and not denied by the Carrier. It will be interesting to note that Chermak was here testifying to an actual occurrence at which he was present. Being a competent witness at such meeting, his statement is entitled to a great deal of weight. However, the statement he made later, which was suppressed by the Carrier for more than a year after it was written, constitutes nothing more than his opinion. There is nothing in the record proving that he is an expert in this field. Consequently, his statement was deserving of little weight. We question the sincerity of Carrier Members' proposition that an employee's opinion should be determinative of another employee's fitness and ability. I am sure that the ap-

plicant for a position can secure more affirmative opinion from employes than Carrier can develop of the negative variety from other employes.

The Award is predicated entirely upon the pertinent facts of record and controlling rules, which no specious reasoning will change.

/s/ J. B. Haines
J. B. Haines
Labor Member

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 9765

DOCKET NO. CL-9501

NAME OF ORGANIZATION: Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

NAME OF CARRIER: The Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

Upon application of the representatives of the Employees involved in the above Award, that this Division interpret the same in the light of the dispute between the parties as to its meaning and application, as provided for in Section 3, First (m) of the Railway Labor Act, approved June 21, 1934, the following interpretation is made:

The Organization contends that under Award No. 9765, the Claimant, in order to be compensated properly for "wage loss incurred" and to fully comply with Award No. 9765 the Carrier must:

- (a) Assign Employee Mitchell to Position No. 80, Assistant Manager Reservation Bureau
- (b) Compensate Employee Mitchell for the difference between the total actual amount paid her and the total actual amount paid employee Black on Position No. 80 from the date employee Black was assigned to and performed service on Position No. 80 and the date employee Mitchell is assigned to and performs service on Position No. 80.

The contention in Paragraph (a) is without merit. Discontinuance was not in dispute at the time of the hearing as the position was not abolished until after the claim was presented. Furthermore, the Board does not have the power to order a restoration of the position abolished under the confronting circumstances.

The contention of the Organization in Paragraph (b) is likewise without merit. Overtime was not in dispute at the original hearing in this case. The only issue was the difference in the rate of pay and not the amount she might have received. Black's compensation is not sufficient proof of what Claimant might have been paid. The fact of the matter is that it would have been against the law to allow Claimant to work the same amount of overtime as Black.

Carrier was correct in paying, or offering to pay, to Claimant the difference between the rate of pay which she received and the rate of pay of Position 80.

Referee Joseph E. Fleming, who sat with the Division, as a member, when Award No. 9765 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 11th day of April 1962.